NO. 79-453

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979.

SAM B. CAPITANO, PETITIONER.

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SEVENTH CIRCUIT
COURT OF APPEALS

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO._____

SAM B. CAPITANO, PETITIONER

VS

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SEVENTH CIRCUIT
COURT OF APPEALS

TO The Honorable, The Chief Justice
and Associate Justices of the
Supreme Court of the United States.

SAM B. CAPITANO, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Seventh Circuit Court of Appeals entered in the above entitled case on May 31, 1979.

OPINIONS BELOW

The opinion of the United States Seventh Circuit Court of Appeals is unreported and is printed in Appendix A hereto, infra, page A-1 . The judgment of the United States Seventh Circuit Court of Appeals is printed in Appendix A hereto, infra, page A-26.

The Journal Entry of Judgment of The United States District Court Northern District of Illinois, Eastern Division, is printed in Appendix A hereto, infra, page A-27.

JURISDICTION

The judgment of the United States Seventh Circuit Court of Appeals was entered on May 31, 1979. (Appendix A, infra, page A-26) A timely petition for rehearing was denied on August 13,

1979. (Appendix A, infra, page A-28). The jurisdiction of the Court is invoked, under 28 U.S.A. §1254 granting petitioner jurisdiction to petition this Court for a Writ of Certiorari.

QUESTIONS PRESENTED

Whether denial of effective cross examination of an important witness to establish her bias, is a denial of the right of confrontation and is a violation of the sixth amendment.

Whether a judge's refusal to sequester the jury to guard against evidence presented and inadmissable at trial, violates the sixth amendment's guarantee of a fair trial.

Whether computer printouts are admissible under the Business Records exception to hearsay when the prosecutor fails to lay a proper founda-

tion and the witnesses called to do so are in fact incompetent to lay that foundation.

Whether the prosecutor's misstatements, leading questions, and prejudicial statements about the petitioner colored the overall atmosphere of the trial and placed unfair impressions upon the jury, thereby deny the petitioner a fair trial by an impartial jury.

STATUTES INVOLVED

United States Constitution, Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Evidence, Rule 611 (b), (c)

(b) Scope of cross-examination. Cross examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to

develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Federal Business Records Act, 28 U.S.C. §1732 (a).

> (a) Business records are admissible in federal courts as evidence of a transaction or occurrence if made in the regular course of business and if it was the regular course of business to make such records within a reasonable time of the transaction or occurrence.

STATEMENT

In February of 1977 the Federal Grand Jury handed down an indictment charging seven defendants, Sam B.

Capitano, James V. Inendino, Thomas B. McKillip, Michael R. Moyer, Charles R. Phebus, Eugene E. Phebus and John D. Phebus with transporting forged securities in interstate commerce, and with conspiracy to commit the same under title 18 United States Code §37,2314, 1343 and 2. The defendants Thomas B. McKillip, Charles R. Phebus, Eugene E. Phebus, and John D. Phebus pled guilty to the above charges. On February 22, 1978, in U.S. District Court Northern District of Illinois, Eastern Division, Sam B. Capitano, James V. Inendino, and Michael R. Moyer were tried on these above charges and a verdict of guilty entered against them.

The charges here involved a check passing scheme whereby checks were stolen from the John Hancock Mutual Life Insurance Company, forged and deposited in bank accounts in Chicago and nearby

suburbs and in Florida. The monies were to be withdrawn but this phase of the scheme was never completed. The prosecutions' case against M. Capitano revolved around testimony by the defendants who had already pled guilty to this scheme.

The testimony established that the Phebus brothers, and Tom McKillip did perpetrate this scheme. The Phebus brothers and Tom McKillip did, however, contradict one another's testimony regarding the alleged role of the defendant Capitano in this scheme. Charles Phebus testified as to his personal friendship with Mr. Capitano and to Mr. Capitano's offer to him of a role in the scheme. Eugene Phebus could only assert that his brother spoke of Capitano. He had no personal dealings with him. In direct conflict with this testimony is that of Tom McKillip who

could in no way implicate Sam Capitano in this scheme but would testify as to the Phebus brothers' role as well as his own.

Further evidence was provided by Norman Bilodeau who himself was under suspicion for the same charges. Again Mr. Bilodeau could provide no link between Sam Capitano and the scheme except that Mr. Capitano was an employee of John Hancock as were several thousand other persons as well as himself. The prosecution attempted to show Mr. Capitano's involvement, through a weekend trip with the Bilodeaus in Atlanta, Georgia at a mutual friend's home. The only evidence this trip produced was that Sam Capitano and Jan Bilodeau were involved in an extramarital affair. That error occurred when Judge Grady refused to allow cross-examination of Jan Bilodeau

to establish her bias against Mr. Capitano.

The next evidence produced to link Capitano to the scheme was that of inadmissible computer printouts of the records of Florida Telephone and Eastern Airlines. The only proof these records provided was that the calls made to Chicago, where the Phebus brothers were depositing checks, were made from John Hancock offices. Another defendant Michael Moyer had access to those phones as well as a number of other office employees and agents.

At the close of all this tenuous evidence the Judge was apprised that the local papers intended to print articles about the defendant Capitano maligning him as having associations with the crime syndicate and as having threatened one of the Phebus brothers. The Judge refused to sequester

the jury even though they were to begin deliberations the following morning.

It is from the facts and errors outlined above that the defendant Sam B. Capitano takes this appeal.

Jurisdiction was had in the United States Court of Appeals pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THIS WRIT

The United States Court of Appeals for the Seventh Circuit indicated with regard to cross-examination of Mrs. Bilodeau that:

> "...Capitano said he also had wanted to show that the witness, who testified that Capitano telephoned her repeatedly, had herself telephoned Capitano repeatedly. ..."

Said statement is certainly accurate, however, it fails to fully incorporate the effect at trial of the testimony that it was Capitano who, in seeking an

illegal purpose, commenced friendly overtures to the Bilodeaus. Without the use of the letters, that was the only impression that the jury could have.

Judge Grady did not allow effective cross-examination on this point because the Judge advised counsel not to mention, refer to or bring up the letters. Without at least referring to the letters, counsel would be hard pressed to place the witness in a position so as to have her faced with her own prejudice against the Defendant. Indeed, it was she that encouraged the relationship between the Defendant and herself and without the letters, her testimony went unchallenged. The jury, too, would not have the opportunity to have important information that would certainly bear heavily on the weight they placed upon her testimony and upon her husband's.

And why would those letters bear upon Mr. Bilodeau's testimony? Because Mr. Bilodeau was supposed to be a respected member of the "John Hancock Community of District Managers". Such scandalous behavior on behalf of his wife or himself would certainly disgrace that position of respect and destroy his career. The only way to protect himself from that potentiality was to testify, as did his wife, in such a way so as to create implications of impropriety against SAM B. CAPITANO, and away from himself.

Another important point was that some of these letters were written before the Atlanta meeting in 1974, which tends to disprove Mrs. Bilodeau's contention that SAM B. CAPITANO encouraged Mr. Bilodeau to come to Atlanta. It is very important, at this juncture, to note that Mr. Bilodeau did not take his keys

to Atlanta and that Mrs. Bilodeau did not take any keys either. The fact was, that Mrs. Bilodeau, as shown by her conduct, and as supported by the letters, had no intention of traveling to Atlanta with her husband, as she testified, but only had wished to travel to see Mr. Capitano. This one single point seriously affects the Government's theory that Mr. Capitano planned to obtain keys from Mr. Bilodeau while he was on vacation with his wife in Atlanta. Even this Honorable Court wrote on Page 7 of its Opinion:

> "... letters ... which were allegedly written after (emphasis added) she (Mrs. Bilodeau) first met him (Sam B. Capitano) in Atlanta in 1974. ..."

We are concerned that the jury came away with a similar impression, that being that a relationship between Mr. Capitano and Mrs. Bilodeau grew as a result of Mr. Capitano's pursuance of an illegal scheme

rather than a relationship that was fully developed prior to the 1974 meeting. For if the proper impression was received by the jury, the testimony of at least three witnesses would have been seriously effected, Mr. Bilodeau, Mrs. Bilodeau, and Chuck Phebus.

Chuck Phebus' testimony would have been effected since Chuck possessed certain information as to Mr. and Mrs. Bilodeau's conduct that was second hand. Defendant Indendino wished to explore those avenues and was foreclosed even before counsel for Mr. Capitano.

Finally, counsel abided by the order of Court, and the letters were not thereafter returned to counsel. No copies were made, only the letters themselves were to be used and such of the contents as were relevant to put forth the aforementioned facts. The fact that counsel does not now possess

the letters and has not possessed them since Mrs. Bilodeau testified; and that counsel was foreclosed from reviewing them or using them to prepare for Defendant's appeal. This fact alone, became a severe handicap in being responsive during oral argument; and, from ever knowing what word, sentence, paragraph, page or letter would have been the one that would have led to Mrs. Bilodeau's recanting of her testimony and changing the import of the testimony of others who testified. Indeed, had the letters not contained references to sexual engagements, we are certain that they would have been admissible at trial and therefore, effective in their purpose, probative in their information, and important towards a fair and impartial trial thereby possibly affecting the outcome of that trial.

The Petitioner also contends that the ruling regarding the Prosecutor's closing remarks is in error and in direct conflict with the Seventh Circuit's previous opinions. The United States Court of Appeals in its opinion stated that the statement made by the Prosecutor was cause for serious concern by the court yet they upheld the introduction of that statement. The Prosecutor informed the jury during his closing arguments that it was comforting to note that the government does not bring charges unless they are sure they can convict the Defendant. In, United States v. Spain, 536, F.2d. 170 (7th Cir., 1976), similar prejudicial remarks were made and the Court of Appeals held,

> This Court may find it necessary in appropriate cases to exercise its supervisory authority, even in the absence of plain error. In the future, all Federal prosecutors in this circuit will conform

their arguments to the standard set by the Supreme Court in the Berger case.

This ruling by the Court of Appeals affected the Petitioner's right to a fair trial by an impartial jury as well as his basic right to be innocent until proven guilty.

The issue of what constitutes a proper foundation for introducing computer printouts as Business Records has never been ruled on by this Court. Due to the nature of this type of evidence and its impact on the jury and the lack of firm rules by lower courts in this area the Petitioner appeals to this Court to settle this important evidentiary question.

Finally the Appellate Court's ruling on the issue of sequestration of the jury and prejudicial news articles was a denial of the Petitioner's Sixth Amendment right to a fair trial by an impartial jury. This Court in Sheppard v. Maxwell,

384 U.S. 333 (1966), specifically held that refusal to sequester a jury when prejudicial publicity is published violates a Defendant's right to a fair trial. In ignoring this holding the Court of Appeals denied the Petitioner his constitutional rights and failed to take note of this Court's ruling precedent.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 1529

UNITED STATES OF AMERICA, Plaintiff-Appellee) vs. SAM B. CAPITANO, et al., Defendant-Appellant)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. The Honorable John F. Grady, Trial Judge

OPINION

1. Closing Argument

Inendino argues that in closing argument the prosecutor stated his personal belief that the government witnesses were telling the truth. The statement complained of was as follows:

> ... as surely as there is a pile of exhibits, of evidence sitting before you and as surely as you heard testimony from the witness stand, I tell you there was a conspiracy in this case and that when Hull and Schremser, Chuck, Gene, John and Tim Phebus and Harold Scully testified, they told you the truth.

As in United States v. Kuta, 518 F.2d 947, 954-955 (7th Cir.), cert. denied, 423 U.S. 1014 (1975), the quoted passage follows a summary of the evidence. It is apparent from the context here, as it was in that case, that the challenged statement was intended to be an argument based on the evidence the prosecutor had just summarized and not a representation that he personally believed the testimony of the witnesses. We believe any listener would so understand it.

Inendino complains that the prosecutor improperly argued that Inendino had threatened government witness Hull and in so arguing misstated the record.

The prosecutor's statement is as follows:

> Now I suggest to you that the threat was very real, that Mr. Hull knew about. It was through Mr. McKillip concerning Mr. Inendino's involvement in the case.

The prosecutor went on to remind the jury that Hull was told by another conspirator, McKillip, that Inendino would provide "protection," and what that meant to Hull.

There was evidence that Inendino had told the Phebus brothers, who were other conspirators, that he would kill his men if necessary, that McKillip had told Hull that Inendino would provide "protection," and that to Hull this meant that any person who fell out of line would be dealt in "a final manner." The argument concerning threats to Hull was a reasonable inference from the evidence. The prosecutor is not limited to a mere recital of the facts but could properly draw inferences concerning Inendino's role

in the scheme and argue those inferences to the jury.

Both defendants complain of the prosecutor's statement during closing argument, "... isn't it reassuring to know the government does not bring criminal charges against someone until they are sure they have the evidene to convict them."

Following an objection by defense counsel, the trial judge ruled that the comment was improper and instructed the jury that the matter of what the evidence proves was for them to determine from the facts and not from opinion and that closing arguments were not facts and it was for the jury to determine what the evidence showed. Under all the circumstances, we believe that this incident consistuted harmless error.

Standing alone, the prosecutor's statement would be cause for serious concern,

but considered in context it was not prejudicial, even though unfortunately phrased. It was made in response to an argument Inendino's counsel had advanced in his opening statement and implied in cross-examination of witnesses that the case against Inendino was a frame-up. An ingredient of this argument was an inference Inendino's counsel sought to have drawn from the fact that Inendino was not named in the superseded first indictment, viz., that the evidence against Inendino was a belated invention. At the time the prosecutor made the statement complained of, counsel for Inendino had not disclaimed an intention to charge the prosecuting attorneys with complicity in the frame-up, although he did exclude them from that charge in his subsequent closing argument for Inendino. The prosecutor's statement was made in response to the frame-up

charge and in particular in an effort to refute the suggestion that the failure to include Inendino in the first and later superseded indictment was an indication that the evidence against him was a relatively late concoction. Although we do not condone the expression chosen by the prosecutor, we think the statement, in the context in which it appeared, was understood by the jury for what it was, viz., a part of an effort to rebut the frame-up charge and not an attempt to buttress the prosecution's case by relying on the pre-indictment opinions of the prosecution.

Capitano argues that the prosecutor misstated evidence to the jury in his rebuttal argument by referring to "Mr. Capitano's home phone number" instead of that defendant's "office" phone number. This reference was immediately objected to, and the prosecutor thereupon

apologized, admitted the mistake, and stated that he should have said "John Hancock office." In addition, at the beginning of the judge's instructions to the jury, the error was noted and corrected. This inadvertent mistake by the prosecutor resulted in no prejudice to Capitano. An unintentional misstatement by the prosecutor which is quickly corrected is not a ground for reversal. United States v. Grooms, 454 F.2d 1308, 1311-1312 (7th Cir.), cert. denied, 409 U.S. 858 (1972).

In summary, a reading of the closing arguments in their entirety convinces us that the statements complained of do not constitute prejudicial error.

2. Limitations on Cross-Examination

Inendino complains that his counsel was precluded from asking the witness Hull

whether Hull had signed an affidavit in March 1976 stating that he last worked in March 1975. The purpose of the inquiry was to impeach Hull's testimony that "he imagined" that he had worked after March 1975. Although we would have allowed the question if we had been in the trial judge's place, the exclusion of this peripheral evidence did not amount to prejudicial error.

Inendino also complains that the trial judge sustained objection to cross-examination of witness Charles Phebus concerning whether he knew that the government's recommendation of dismissal of some of the criminal charges pending against him would have the ultimate effect of significantly reducing any potential sentence he might receive. The defendant was permitted to elicit from Phebus that eleven charges had been dropped and that each of those charges

carried a prison sentence. The benefit the witness perceived from the dismissal of the charges was apparent from the evidence the jury heard, and no prejudice resulted to Inendino from the judge's refusal to allow embellishment.

Inendino also argues that his counsel was improperly precluded from inquiring into the current employment of witnesses Chuck Phebus and Schremser. The judge foreclosed examination on this subject because of a reasonable basis for fear expressed by the witnesses. We find no error and no prejudice in this ruling.

Inendino also argues that the court improperly sustained objection to cross-examination of Chuck Phebus with respect to whether Gene Phebus had told Schremser in Chuck's presence that Gene had been involved in a truck hijacking and that the scheme which was the subject

matter of the instant indictment was bigger and better than the hijacking. In so arguing, Inendino misstates the record. His counsel asked Chuck Phebus without objection whether, in conversation with Tom Rich, Gene Phebus had said the check deal was "even bigger and better" than a hijacking and theft of trucks in which Gene had engaged in January 1974; and the witness answered no. The court sustained objection to the question whether the previous questions were the first the witness had heard of the hijacking matter, on the ground that the cross-examiner was bound by the witness' previous answers on this collateral matter. The judge could reasonably have viewed the question to which he sustained objection as an argumentative quibble with a previous answer on a collateral matter. Inendino also asserts error in the judge's refusal to allow an offer of proof on

this matter, but the judge expressly stated that an offer could be made later during a recess, and apparently no offer was ever tendered. We find no error in this incident.

Inendino also argues that the court improperly restricted an attempt to impeach Chuck Phebus' credibility by cross examining John Phebus about whether Chuck had told John that Chuck was acquainted with Norman Bilodeau. This argument and a related one concerning the judge's statement of his recollection of the evidence and his disagreement with the recollection of Inendino's counsel, arise from an indefinite antecedent in an answer the witness had given during the following redirect examination:

BY MR. MARKLEY:

Q. Did Mr. Capitano ever tell you while you were in Florida that he knew Mr. Bilodeau?

A. I do not know that for sure.

Q. Did Chuck ever tell you that he (Mr. Capitano or Chuck?) knew Mr. Bilodeau?

A. Yes, sir.

Q. What did Chuck say?

A. That he was good friends with Bilodeau.

Q. Who did Chuck say that --

A. Sam (Capitano) and Bilodeau were friends.

Q. Did Chuck ever meet Bilodeau that Chuck told you about?

A. That I do not know.

We understand this testimony as the trial judge did, i.e., as meaning that Chuck said Sam and Bilodeau were friends. On recross by counsel for Inendino, however, the following occurred:

Q. When did your brother Chuck tell you that he was good friends with Mr. Bilodeau?

A. He never told me that.

Q. Didn't you testify in answer to a question of Mr. Markley's just a little while ago when he was asking you questions, that Chuck said he was good friends with

Bilodeau?

A. No, I didn't.

Q. You didn't say that?

A. No, I said he was good friends of Sam's.

Q. Did you say that?

A. As far as I know, no.

THE COURT: Mr. Echeles --

MR. ECHELES: Yes, your Honor?

THE COURT: The Court will say that the witness did not say that.

Then followed a colloquy in which Inendino's counsel and the court stated their disagreement over what the initial testimony had been.

Eventually, the judge had that initial testimony read to the jury. Thus the jury was allowed to make its own determination of which interpretation was correct. If any embarrassment to counsel resulted, he brought it on himself. We see no conceivable prejudice

in this incident.

Capitano argues that the court improperly precluded his counsel from cross-examining Mrs. Bilodeau concerning whether she had engaged in a sexual relationship with Capitano. We are unable to perceive the relevance of this evidence. Capitano argued in his brief before us that the evidence would show she was biased against him. At oral argument, his counsel was unable to explain why this would follow. As we said in United States v. Harris, 542 F.2d 1283, 1302 (7th Cir.), cert. denied, 430 U.S. 934 (1976),

> We do not find that a sexual relationship will per se give rise to bias, either favorable or unfavorable.

During his oral argument, counsel for Capitano said he also had wanted to show that the witness, who testified that Capitano telephoned her repeatedly, had herself telephoned Capitano repeatedly.

A reading of her testimony, however, shows that she admitted that she and her husband had called Capitano a number of times. Counsel was not prevented from developing this line of inquiry further if he had chosen to do so. He was prohibited from inquiring into the sexual relationship, because he had not shown the court what the relevance of that relationship would be. We do not get from the witness' testimony the impression that contacts between Capitano and the Bilodeaus were primarily initiated by him rather than them. This afterthought argument by counsel is without merit.

Counsel for Capitano also stated on oral argument another contention not made in his brief, viz., that the judge had erred in excluding certain letters marked "Capitano Group Exhibit 5" which were allegedly written by Mrs. Bilodeau to Capitano after she first met

him in Atlanta in 1974. Counsel argued that these letters might contradict testimony Mrs. Bilodeau had given on the stand. Counsel had seen the letters, of course, since they were purportedly written to and produced by his client. Nevertheless, when interrogated by us, he was unable to state how these letters tended to impeach Mrs. Bilodeau on any material matter. Nor did he state how they might otherwise bear on any relevant issue. We have read Mrs. Bilodeau's testimony, Capitano's offer of proof presented by cross-examining Mrs. Bilodeau outside the presence of the jury, and the letters themselves. After doing so, we are still unable to perceive any relevance in the letters or in the fact of the witness' sexual relationship with Capitano.

3. Refusal to Sequester Jury and Interrogation of Jurors About Newspaper Stories

The afternoon before the submission of the case to the jury, defense counsel advised the court of the possibility that newspaper stories pertaining to the trial and the defendants were likely to appear and moved that the jury be sequestered. The court denied the motion but advised the jury that there might be newspaper stories and admonished them not to read the newspapers at all. No objections were made to the court's statement.

The following morning, after the appearance of stories in the Chicago Sun Times and the Chicago Tribune which would have been prejudicial if read by the jurors, counsel for the defendants brought the stories to the judge's attention and moved for a mistrial. The judge stated that he would conduct a collective

voir dire of all the jurors to determine whether any of them had read the article and that if any had done so he would examine the jurors individually in camera. Defendants did not object but made suggestions relating to the scope of the inquiry. The judge then interrogated the jurors collectively and determined that no juror had read the newspaper stories.

On at least six prior occasions during the trial the judge had instructed the jury at the end of the day that, inter alia, they should not read any accounts of the case in the newspapers or listen to any comments about it on radio or television, if any such appeared.

The defendants argue that the court erred in refusing to sequester the jury and, further, that he failed to properly examine the jurors concerning their

reading of the newspaper articles.

Sequestration of the jury is a matter for the discretion of the trial judge. If adequate steps are taken to insure that jurors are not exposed to prejudicial publicity, it is not error to refuse sequestration. Margolis v. United States, 407 F.2d 727, 732-733 (7th Cir.), cert. denied, 396 U.S. 833 (1969). Here the court repeatedly admonished the jury not to read newspaper stories concerning the case and interrogated them to determine whether they had obeyed these instructions. We cannot say that the collective examination of the jurors concerning their compliance, rather than individual examination, was an inadequate means of determining that no juror had read the stories. United States v. Margolis, supra, 407 F2d at 734-735; United States v. Barrett,

505 F.2d 1091, 1100 (7th Cir.), cert. denied, 421 U.S. 964 (1975). It is noteworthy that no objections were made at the time to the procedure the judge followed, except those concerning the failure to sequester the jury.

Defendants now argue that the court handled the matter in such a way as to call the articles to the jurors' attention and then discourage them from giving truthful answers to the questions concerning whether they had read the newspaper stories. Again, in the absence of objections made at the time of the procedures now challenged, and after a review of the transcript, we believe that there was neither error nor an abuse of discretion.

4. Sufficiency of Evidence on Substantive Counts Against Inendino

Inendino argues that there was

insufficient evidence to support conviction of the substantive offenses of causing transportation of checks from Chicago to Boston, Massachusetts. He was acquitted of the count dealing with the transportation of forged checks from Chicago to Florida after a determination had been made to move the operation to Florida.

The government relies on the doctrine that when there is a conspiracy (and Inendino does not challenge the sufficiency of the evidence to establish conspiracy), and an act in furtherance of the conspiracy is committed, all of the conspirators are guilty of the substantive act by reason of their participation in the conspiracy. United States v. Peskin, 527 F2d 71, 75-76 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); United States v. Joyce, 499 F2d 9, 16 (7th Cir.), cert. denied,

419 U.S. 1031 (1974).

Although use of interstate facilities is a basis for jurisdiction only, and knowledge of such use is unnecessary for conviction, United States v. Peskin, supra, 527 F2d at 78, there was ample evidence here that Inendino knew interstate transportation would be a necessary part of carrying out the conspiracy. That evidence showed the following: The Phebus brothers informed Inendino of the scheme prior to Labor Day 1974. He was shown a sample Hancock check. Through the Phebuses and McKillip, he learned that the checks had to be deposited in Chicago area banks, and that before money could be drawn from the accounts, the checks had to clear the banks on which they were drawn. Knowing that all the Hancock checks were drawn on a bank in Boston, Inendino could foresee that they would

be transported interstate between Illinois and Massachusetts. Certain Hancock checks were deposited in the Chicago area banks and sent by them to the Boston bank through normal banking channels for payment, and the checks were returned to the Chicago area banks unpaid.

Withdrawals of the proceeds of the deposits of the Hancock checks could not be made from the Chicago area banks until the checks had been sent from Illinois to the Boston bank. Thus, in order for Inendino to receive any part of his compensation for participating in the scheme, the forged checks were required to be transported in interstate commerce, and Inendino must have known this. Therefore, interstate transportation of the checks was not only foreseeable by Inendino but essential to the scheme. The transportation of the forged checks

was in furtherance of the conspiracy and Inendino was chargeable with that transportation.

The government also points out that Inendino aided and abetted the substantive offenses by sharing in the criminal purpose and assisting in the accomplishment of that purpose. United States v. Martinez, 555 F2d 1269. 1271-1272 (5th Cir. 1977). His conviction can also be supported on that theory.

5. Foundation for Computer Printouts

The government introduced documentary evidence of telephone calls and airline reservations. Records of telephone calls for the months of September and October 1974 were introduced through the testimony of a records custodian from the General Telephone Company of Florida. Airline reservation records for flights

during August and September 1974 were introduced through the testimony of a records custodian from Eastern Airlines' Miami Florida office.

Capitano argues that there was an inadequate foundation for the admission of this evidence, because no computer expert testified that the computers that produced the records were programmed accurately to insure their reliability. He does not question the authenticity of the records or the recordkeeping procedures. While the foundation for this evidence might have been more extensive, see United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir.), cert. denied, 434 U.S. 940 (1977), we believe that the requirements of Rule 803(6) of the Federal Rules of Evidence were satisfied.

The judgments of conviction are affirmed.

AFFIRMED.

JUDGMENT

Defendants were convicted before a jury of transporting forged checks in interstate commerce and conspiracy to do the same. Inendino was found guilty under the conspiracy count of the indictment and eleven substantive counts, and Capitano under those same counts and one additional substantive count. Each defendant was sentenced to five years on each count, the sentences to run concurrently. We find their various claims of trial error to be without merit and affirm the convictions.

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- SAM B. CAPITANO, Defendant.	)	NO. 76 CR 876 Judge John F. Grady

JOURNAL ENTRY OF JUDGMENT OF THE
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

It Is Adjudged that on Counts 1 through 13 that defendant is hereby committed to the custody of the Attorney General for imprisonment for a term of five (5) years. Said sentences on Counts 1 through 13 to run concurrently with each other.

(SGD) JOHN F. GRADY
JUDGE

IN THE

UNITED STATES

COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 1529

UNITED STATES OF AMERICA, Plaintiff-Appellee)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
vs.	
SAM B. CAPITANO, et al., Defendant-Appellant)	The Honorable John F. Grady, Trial Judge

ORDER FOR REHEARING

This matter comes before the court on the "MOTION TO EXTEND TIME FOR FILING, RE-HEARING AND PETITION FOR CERTIORARI" and affidavit in support thereof, filed herein on August 9, 1979, by counsel for the defendant-appellant. On consideration thereof,

IT IS ORDERED that said motion be, and the same is hereby DENIED.

(SGD) PHILIP W. TONE
CIRCUIT JUDGE